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OCBC BANK (MALAYSIA) BHD v. TIONG CHIONG HIEH & ORS

HIGH COURT SABAH & SARAWAK, SIBU
WONG SIONG TUNG J
[ORIGINATING SUMMONS NO: SBW-24FC-15-7-2022 (HC)]
11 MAY 2023

B

Abstract – *(i) There must be a pre-existing default by the chargor, of the term of the charge, before the chargee is entitled or has the right to issue the statutory notice under s. 148(1) of the Sarawak Land Code (Cap 81). Without a demand made upon the chargor to pay, there could be no default by the chargor of the terms of the charge; (ii) a chargee is entitled to the remedy of an order for sale of a wholly-charged land, and not a portion of it or of some proposed subdivided lots as may be approved in a development plan for which there are no separate individual documents of title granted or issued.*

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LAND LAW: *Charge – Third party charge – Land charged by chargor to chargee bank to secure repayment of monies due by borrower to chargee bank – Facilities granted by chargee bank to borrower – Borrower defaulted in repayment – Chargee bank issued statutory notices under s. 148(1) of Sarawak Land Code (Cap 81) to chargors, demanding payment under memorandum of charge – Whether statutory notices lawfully given – Whether there was pre-existing default in payment by chargors – Whether there was pre-existing breach of chargors of terms of charge – Whether chargors same persons as borrowers – Whether default by borrower in payment of sums due under facilities agreements could constitute default on part of chargors under terms of memorandum of charge*

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LAND LAW: *Order for sale – Application for – Charged land – Application by bank for order for sale of portion of land – Application made without and before grant/issuance of separate individual documents of title – Whether would have effect of partitioning or subdividing charged land notwithstanding terms and conditions in subdivision approval not fully complied with – Whether bank entitled to grant order for sale – Whether within ambit of court's powers – Sarawak Land Code (Cap 81), ss. 25, 148(2)(c), 150(3), 244*

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The plaintiff applied for an order, pursuant to s. 148(2)(c) of the Sarawak Land Code (Cap 81) ('Code') for the sale of a hypermarket, including a car park, which was a portion within all that parcel of land, together with the building on it and appurtenances ('parent lot'). The parent lot had been charged by the defendants to the plaintiff, under a memorandum of charge instrument, to secure the repayment of monies due by one Episo Enterprise Sdn Bhd ('borrower') to the plaintiff in respect of banking facilities granted

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by the plaintiff to the borrower. The banking facilities were granted by the plaintiff to the borrower to part-finance the borrower in the construction of the hypermarket with sub-division approval for commercial and residential development on the land under the parent lot. Approval had been obtained from the State Planning Authority for the development and subdivision of the land ('subdivision approval'). However, the separate individual documents of title in respect of the proposed subdivided lots in the subdivision approval have still yet to be issued by the relevant authority under s. 244 of the Code. The borrower had entered into various sale and purchase agreements to sell various proposed subdivided lots in the subdivision approval to various purchasers. The borrower was wound up and, further, it defaulted in the repayment of the banking facilities granted by the plaintiff. The plaintiff, through its solicitor, issued statutory notices to the defendants, demanding payment as chargors under the memorandum of charge, of the sum of RM17,945,162.63 due and owing by the borrower ('statutory notices'). Following the failure on the part of the defendants to pay the sum demanded, the plaintiff commenced the present action. The issues that arose for adjudication were: (i) whether the statutory notices were lawfully given on behalf of the plaintiff by its solicitor to the defendants; (ii) whether the statutory notices were given to the defendants under s. 148(1) of the Code; and (iii) whether the plaintiff was entitled to seek an order for sale of a portion of the charged land.

Held (dismissing application):

(1) The statutory notices under s. 148(1) of the Code could not be said to be lawfully given by the plaintiff, as the chargee, to the defendants, as the chargors, unless and until there had been a default by the defendants, as chargors, in the payment of the sums secured by the charge created by the memorandum of charge. There must be a pre-existing default in the payment or breach by the defendants, as chargors, of the terms of the charge before it could be said that the said statutory notices were lawfully given on behalf of the plaintiff, by its solicitor, to the defendants under s. 148(2) of the Code. The charge, as created by the memorandum of charge, was a third party charge where the chargors were not the same persons as the borrowers. The default by the borrower in payment of the sums due, under the terms of the facilities agreements that the borrower made with the plaintiff, could not constitute a default on the part of the defendants, as the chargors, under the terms of the memorandum of charge. There was also no evidence that the plaintiff had ever demanded payment by the defendants, as chargors, of the indebtedness of the borrower in respect of the banking facilities concerned. (paras 23, 24, 28, 29 & 34)

(2) The defendants had successfully rebutted the presumption that they were not indeed served or given the statutory notices issued by the plaintiff's solicitors by the production of the print-outs of the trace and tracking of the delivery of the said statutory notices from the website of Pos Malaysia which showed that the statutory notices were all returned to the plaintiff and undelivered to the defendants. As the said statutory notices had not been given to the defendants, as the chargors, as required under s. 148(1) of the Code, the plaintiff, as the chargee, was not entitled to make the application in the instant action and not entitled to the order of sale as sought under s. 148(2)(c) of the Code. (paras 61 & 62)

(3) To grant the order for sale of the hypermarket, as sought by the plaintiff, without and before the grant or issuance of the separate individual documents of title would have the effect of partitioning or subdividing the charged land notwithstanding that the terms and conditions in the subdivision approval had not been fully complied with or contrary to or in avoidance of the provisions for subdivision. It would be repugnant to ss. 25, 150(3) and the provisions for subdivisions in Part X of the Code. Therefore, the plaintiff was not entitled and it was also beyond the limit of the power of the court to grant the order for sale of only the hypermarket; it could not be granted. (paras 95 & 96)

Case(s) referred to:

Arab-Malaysian Merchant Bank Bhd v. Low Toon Thye [1997] 1 LNS 292 HC ***(refd)***
Buckley v. Howell, 29 Beav 546 ***(refd)***
Citibank N.A. v. Jong Tze Khiok & Anor [1993] 4 CLJ 325 SC ***(refd)***
Commonwealth Bank Of Australia v. Saunders (1995) 181 LSJS 363 ***(refd)***
Commonwealth Bank Of Australia v. Saunders (1995) 64 SASR 428 ***(refd)***
Goh Teng Whoo & Anor v. Ample Objectives Sdn Bhd [2021] 4 CLJ 348 FC ***(refd)***
Habib Bank Ltd v. Tailor [1982] 3 All ER 561 ***(refd)***
Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***
Kuching Plaza Sdn Bhd v. Bank Bumiputra (M) Bhd [1991] 3 CLJ 1702; [1991] 1 CLJ (Rep) 223 SC ***(refd)***
Lloyds Bank Ltd v. Margolis [1954] 1 All ER 734 ***(refd)***
Mediservices International Pty Ltd v. Stocks and Realty (Security Finance) Pty Ltd [1982] 1 NSWLR 516 ***(refd)***
Murugappa Chettiar v. Letchumanan Chettiar [1938] 1 LNS 43 HC ***(refd)***
Re Yates Batcheldor v. Yates (1888) 38 Ch D 112 ***(refd)***
RHB Bank Bhd v. Alom Industries Sdn Bhd [2007] 5 CLJ 138 HC ***(refd)***
State Bank of SA v. Jeltes 49 SASR 307 ***(refd)***
Stewart v. Rowsom [1892] OJ No. 162 ***(refd)***
Taylor v. Parkinson & Blyth (1911) 31 NZLR 354 ***(refd)***
United Peoples' Organisation (World Wide) Inc. v Rakino Farms Limited (No. 2) [1964] NZLR 739 ***(refd)***

Legislation referred to:
Interpretation Ordinance 2005, s. 3(5)
Land Code (Cap 138), s. 149
Land Code (Sarawak), ss. 2, 25, 129(1), 137(3), 148(1)(c), (2)(c), (3), 150(3), (4), 208, 232, 235, 244, Part X

For the plaintiff - Anastasia Chin & Stella Sim; M/s Reddi & Co Advocates, Kuching
For the defendants - Sunny Si Poh Heng; M/s Si & Associates Advocates, Kuching

Reported by Najib Tamby

JUDGMENT

Wong Siong Tung J:

Introduction And Backgrounds

[1] By this reamended originating summons herein (encl. 35), the plaintiff is applying for an order under s. 148(2)(c) of the Land Code (Cap 81) for the sale of the two-storey hypermarket including the car park (Phase 1 development) measuring approximately 3.106 acres only described as Lot 1856 and 1858 (part of Parent Lot 1304), Block 3, Sungai Merah Town District, Sibu (hereinafter referred to as "the hypermarket") which is a portion within all that parcel of land together with the building thereon and appurtenances thereof situated at Sungai Merah, Sibu, containing an area of 5.272 hectares, more or less, and described as Lot 1304, Block 3, Sungai Merah Town District (hereinafter referred to as "the Parent Lot 1304").

[2] The Parent Lot 1304 has been charged by the defendants to the plaintiff under memorandum of charge instrument No. L.3275/2010 registered at the Sibu Land Registry Office on 16 March 2010 (hereinafter referred to as "the said memorandum of charge") to secure the repayment of monies due by one Episo Enterprise Sdn Bhd (hereinafter referred to as "the borrower") to the plaintiff in respect of banking facilities granted by the plaintiff to the borrower under various letters of offer of the plaintiff and facilities agreement executed by the plaintiff and the borrower (exhs. TMH-1 to TMH-7 of encl. 2).

[3] The banking facilities comprised of two term loans and a letter of guarantee which were granted by the plaintiff to the borrower to part-finance the borrower in the construction of the hypermarket with subdivision approval for commercial and residential development on the land under the Parent Lot 1304.

[4] From the affidavit evidence, it seems that approval has been obtained from the State Planning Authority for the development and subdivision of the land held under the Parent Lot 1304 (hereinafter referred to as "the subdivision approval").

[5] The actual status of the construction and development on the Parent Lot 1304, *ie*, whether the construction development thereon has been in accordance with subdivision approval, the approved plans, terms and conditions therefrom is not clear based on affidavit evidence.

[6] However, it is indisputable that the separate individual documents of title in respect of the proposed subdivided lots in subdivision approval have still yet to be issued by the relevant authority under s. 244 of the Land Code (Cap 81).

[7] It is not disputed that the borrower had entered into various sale and purchase agreements whereby the borrower agreed to sell various proposed subdivided lots in subdivision approval to various purchasers.

[8] These purchasers had also procured loan facilities from their respective bankers concerned for payment of the purchase price of proposed subdivided lots concerned in subdivision approval and for which the plaintiff disclaimed and agreed to discharge these proposed subdivided lots concerned from the charge under the said memorandum of charge.

See: exhs. TMH-3 and TMH-4 of encl. 2.

[9] It is a fact that the borrower was ordered to be wound-up by the court on 19 January 2022. It is indisputable that the borrower has defaulted in the repayment of the banking facilities granted by the plaintiff.

[10] The plaintiff, through its solicitor, issued statutory notices all dated 8 June 2022 (exh. TMH-9 of encl. 2) to the defendants which demanded payment by the defendants as chargors under the said memorandum of charge, of the sum of RM17,945,162.63 due and owed by the borrower as on 31 May 2022 failing which the plaintiff will apply to the court for all legal remedies available to the plaintiff under s. 148(2) of the Land Code (Cap 81) (hereinafter referred to as "the said statutory notices").

[11] Following the failure on the part of the defendants to pay the said sum as demanded, the plaintiff commenced the action herein.

[12] Initially, the plaintiff sought in the action an order for sale of the whole Parent Lot 1304.

See: originating summons dated 15 July 2022 (encl. 1).

[13] This is without any consideration and without any reservation of the liabilities and obligations of the plaintiff by the disclaimers given by plaintiff and agreements of the plaintiff to discharge from the charge, the various portions of the land therein comprising the various proposed sublots concerned in the approved subdivision for which the borrower had entered into the various sale and purchase agreements with the various purchasers concerned. In other words, the order for sale of the Parent Lot sought by the plaintiff initially was not subject to rights and interests therefrom of these purchasers and their bankers concerned as financiers.

[14] Seemingly to obviate the intervention of these purchasers in the action and their objections to the order for sale of the Parent Lot 1304 as sought by the plaintiff, the plaintiff amended its relief sought in the originating summons herein.

[15] By the amended originating summons herein, instead of seeking for an order for sale of the Parent Lot 1304 subject to the rights and interests of these purchasers and their financiers concerned in respect of the various proposed sublots concerned in the subdivision approval arising from the disclaimers given by the plaintiffs and agreements of the plaintiff to discharge the same from the charge under the said memorandum of charge, the plaintiff seeks an order for sale of the hypermarket for which separate individual documents of titles have yet to be issued.

Whether The Statutory Notice Dated 8 June 2022 (Exhibit TMH-9 Of Enclosure 2) Was Lawfully Given On Behalf Of The Plaintiff By Its Solicitor To The Defendants

[16] In opposing the plaintiff's application for the order for sale by the amended originating summons, firstly, learned counsel for the defendants submitted that the debt of the borrower due and owed to the plaintiff for the banking facilities granted by the plaintiff was payable only by the defendants to the plaintiff on demand by the terms of the said memorandum of charge.

[17] It was submitted that the plaintiff had not demanded payment of the sum due and owed by the borrower under the terms of said memorandum of charge and secured thereby before the plaintiff by their solicitors issued the said statutory notices to the defendants.

[18] Thus, there was no default by the defendants, a condition precedent which was not fulfilled before the plaintiff by their solicitors issued the said statutory notices to the defendants and therefore, there was no valid statutory notice of demand given by the plaintiff under s. 148(1) of the Land Code (Cap 81).

[19] The submissions of learned counsel for the plaintiff seems to be that no such prior demand for payment is required to be made upon the defendants before the said statutory notices could be issued to the defendants and that the default by the borrower in payment of the sums due and owed is sufficient for the issuance of the said statutory notices to the defendants.

[20] To entitle the plaintiff to apply for an order for sale of the charged land, s. 148(2) of the Land Code (Cap 81) required it be established that the said statutory notices (exh. TMH-9 of encl. 2) were lawfully given on behalf of the plaintiff by their solicitor to the defendants and that the defendants have failed to comply with the requirements of the said statutory notices as given.

[21] Section 148(2) of the Land Code (Cap 81) so far as relevant is reproduced as follows for analysis:

> Remedies for default
>
> 148. (1) *If default be made in the payment* of the principal sum, interest or other moneys *secured by a charge*, or in the observance of any agreement, expressed or implied *in any charge, the chargee may give to the chargor*, his personal representatives or assigns, *notice in writing that the chargee will resort to all available remedies unless such default be remedied*.
>
> (2) If the chargor fails to comply with the requirements of *any notice lawfully given*, the chargee shall be at liberty to apply to the High Court:
>
> (a) for an order entitling him to enter into possession and to be registered as proprietor of the charged land;
>
> (b) to receive the rents and profits of the charged land; or
>
> (c) *for the sale of the charged land*,
>
> and the Court after hearing the evidence may make such order as in the circumstances seems just:
>
> (3) The notice under subsection (1) *shall comply with the terms of the charge*:
>
> Provided that, without prejudice to s. 145(4), *if no period of notice for the purposes of this section is stipulated by the charge, not less than thirty days' notice shall be given*.
>
> (emphasis added)

[22] For the said statutory notices to be lawfully given by the plaintiff as the chargee to the defendants as the chargors, they have to comply with the requirements of s. 148(1) and (3) of the Land Code (Cap 81) which are:

(i) there must be default made by the defendants as chargors in payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge;

(ii) the said statutory notices must be in writing notifying the defendants as chargors, of the default of the defendants complained of;

(iii) the said statutory notices have to notify the defendants as chargors that unless such default be remedied within certain time or by certain date in accordance with the terms of the charge or s. 148(3) of the Land Code (Cap 81) if applicable, the plaintiff as chargee will resort to all available remedies.

[23] The said statutory notices under s. 148(1) of the Land Code (Cap 81) could not say to be lawfully given by the plaintiff as the chargee to the defendants as chargors unless and until there has been a default by the defendants as chargors themselves in payment of the sums secured by the charge created by the said memorandum of charge.

[24] There must be a pre-existing default in the payment or breach by the defendants as chargors of the terms of the charge before it can be said that the said statutory notices (exh. TMH-9 of encl. 2) were lawfully given on behalf of the plaintiff by its solicitor to the defendants under s. 148(2) of the Land Code (Cap 81).

[25] In *Citibank N.A. v. Jong Tze Khiok & Anor* [1993] 4 CLJ 325; [1993] 3 MLJ 449, though the Supreme Court allowed the appellant chargee's appeal, the Supreme Court held that it was the default (on the part of the respondents chargors to make payment on demand) and not the demand for payment by a chargee under the term of the charge that triggers off the right of the chargee to issue the statutory notice under s. 148(1) of the Land Code (Cap 81).

[26] In other words, there must be a pre-existing default by the chargor of the term of the charge before the chargee is entitled or has the right to issue the statutory notice under s. 148(1) of the Land Code (Cap 81).

[27] It logically follows that without a demand made upon the chargor to pay, there can be no default by the chargor of the term of the charge.

[28] In the instant case, the charge created by the said memorandum of charge is commonly known as the third party charge where the chargors are not the same persons as the borrowers.

[29] The default by the borrower in payment of the sums due under the terms of the facilities agreements that the borrower made with plaintiff cannot constitute a default on the part of the defendants as the chargors under the terms of the said memorandum of charge.

[30] Section 6.01(a), s. 6.01(b) and s. 6.01(d) of the annexure to the said memorandum of charge are reproduced as follows:

> Section 6.01 Covenant To Pay
>
> (a) In consideration of the Bank, at the request of the borrower(s) and the Chargor(s), having granted and made available and/or agreeing to grant and make available and/or continuing to grant and make available the Facilities to the borrower(s), *the Chargor(s) hereby, covenants and agrees to forthwith pay to the Bank on demand the Indebtedness failing which the Bank may forthwith give the statutory notice pursuant to the relevant provisions of the applicable Act requiring the borrower(s) or the Chargor(s) to remedy the said failure or refusal to pay* within a period of seven (7) days calculated from the date such statutory notice is deemed to have been served under the provisions contained herein. If the statutory notice under any of the applicable Acts must by law be for a period longer than seven (7) days then the statutory notice given pursuant to such Act shall be for the duration prescribed under that Act.

A (b) If and when the said account or accounts current or otherwise shall be closed either by demand as aforesaid or by the death or bankruptcy or winding-up or other default, as the case may be, of the borrower(s) (or where the borrower(s) shall be more than one person by the death or winding-up or other default as the case may be of any of them) a balance shall be owing to the Bank by the borrower(s) or the personal B representatives or liquidators of the borrower(s), as the case may be, the Chargor(s) will so long as the same or any part thereof shall remain owing pay to the Bank interest thereon at the Late Payment/Excess Interest Rate or such other rate specified by the Bank (both before as well as alter demand or judgment or order irrespective of whether or not the banker C customer relationship exists or has been terminated) computed from the date such monies are incurred or expended or paid out by the Bank up to the date of the Bank's actual receipt of repayment of the monies secured by this Charge and the other Security Documents and *shall on demand be repaid to the Bank*.

D The Chargor(s) agree(s) that the statement issued by the Bank or any solicitor or firm of solicitors purporting to act for the Bank as to the amount of such outstanding sums shall be final and conclusive evidence against the Chargor(s).

(c) ....

E (d) Without prejudice to the generality of Section 6.01(a) above, the Indebtedness shall become forthwith due and payable and must be discharged by the Chargor(s) immediately upon the happening of any of the Events of Default or if the Chargor(s) threatens to commit or commits a breach of any of the terms contained in this Charge (other than the covenant or undertaking for payment of moneys due under Section F 6.01(a) above) which is capable of remedy and is not remedied *within the timeframe stipulated by the Bank in its notice to the Chargors.* In the event that the Chargors shall fail to pay the Indebtedness or shall fail to remedy the breach, *the Bank shall be entitled to exercise its rights as provided in Section 6.01(a)* above. (emphasis added)

G **[31]** The provision in s. 6.01(a) of the annexure to the said memorandum of charge also provided that only upon failure of the defendants to pay the indebtedness of the borrower after the plaintiff demanded payment by the defendants that the plaintiff may proceed to give the statutory notice under s. 148(1) of the Land Code (Cap 81).

H **[32]** The provisions contained in s. 6.01(a) read with s. 6.01(b) and s. 6.01(d) of the annexure to the said memorandum of charge only rendered the defendants liable as the chargors to pay the plaintiff as the chargee, the indebtedness of the borrower in respect of the banking facilities granted and secured by the charge upon demand by the plaintiff in writing made upon the defendants.

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[33] Thus, there is no question of default or breach by the defendants of the terms of the charge without a demand by the plaintiff made upon the defendants to pay the indebtedness of the borrower secured by the said memorandum of charge and until after failure on the part of the defendants to pay the plaintiff as demanded.

See: *Lloyds Bank Ltd v. Margolis* [1954] 1 All ER 734 at 737-8; and *Habib Bank Ltd v. Tailor* [1982] 3 All ER 561.

[34] There is no evidence that the plaintiff had ever demanded payment by the defendants as chargors of the indebtedness of the borrower in respect of the banking facilities concerned that the plaintiff had granted to the borrower.

[35] That being the case, it cannot be said that there was pre-existing default or breach by the defendants as the chargors of the terms of the said memorandum of charge when the plaintiff gave the said statutory notices (exh. TMH-9 of encl. 2) to the defendants as the chargors.

[36] Therefore, it cannot be said that the said statutory notices were lawfully given on behalf of the plaintiff by its solicitor to the defendants under s. 148(2) of the Land Code (Cap 81). In gist, they were not validly given to the defendants for the plaintiff to make the application for the order for sale.

See: *Commonwealth Bank Of Australia v. Saunders* BC9503172; (1995) 181 LSJS 363; *Commonwealth Bank Of Australia v. Saunders* BC9502342; (1995) 64 SASR 428; and *State Bank of SA v. Jeltes* 49 SASR 307.

Whether The Statutory Notice Was Given To The Defendants Under Section 148(1) Of The Land Code (Cap 81)

[37] If this court is wrong in holding that there was no pre-existing default or breach by the defendants as the chargor of the terms of the said memorandum of charge when the plaintiff as chargee issued the said statutory notices (exh. TMH-9 of encl. 2) to the defendants, this court will proceed to determine whether the said statutory notices were in fact given to the defendants for the purpose of s. 148(2) of the Land Code (Cap 81).

[38] There is no issue that the plaintiff did send to the defendants at their given address, the said statutory notices by registered post, posted on 9 June 2022 at the post office in Kuching.

See: exhs. TMH-9 and TMH-9A of encl. 2.

[39] The defendants alleged that they had not received the said statutory notices. To establish that, the defendants produced the print-outs of the trace and tracking of the delivery of the said statutory notices with their registered post number respectively from the website of Pos Malaysia. They show that the said statutory notices were all returned to the plaintiff undelivered to the defendants.

See: exhs. TC-14, TC-15, TC-16 and TC-17 of encl. 9.

[40] It seems that the plaintiff did not dispute the authenticity of the said print-outs to be from the website of Pos Malaysia and the truth of the statements in respect of the tracking for the delivery of the said statutory notices.

[41] The plaintiff's contention was that the said statutory notices were not delivered to the defendants because the defendants themselves refused to accept the same or tried to evade service and therefore the defendant cannot be heard to say that they were not served.

[42] A close examination of these print-outs (exhs. TC-14, TC-15, TC-16 and TC-17 of encl. 9) reveal that the post personnel did attempt to deliver the said statutory notices to the defendants at their given address on 14 June 2022 at 3.45pm but unsuccessful with the statement of remarks:

> "Unsuccessful delivery due to ITEM REFUSED BY ADDRESSEE <DELIVERY OFFICE SIBU <OAL>>

[43] However, there is another statement of remarks on the same day and same time at 3:45pm as follows:

> Unable to complete delivery
>
> Sadly, there was no one around when we attempted to deliver. We will try again tomorrow.
>
> (Pusat Seraham Mel Sibu)

[44] From these remarks, it cannot be that the defendants were refusing to accept the said statutory notices when at the same time it was said that the defendants were not around at the address of the premises where the delivery to them was said to have attempted.

[45] The statement of remarks by the post personnel on the following day, namely 15 June 2022 at 4pm is as follows:

> Item dispatched out Mail Processing Center Kuching (Delivery Office Sibu)

[46] It shows that without any further attempt made to deliver the said statutory notices to the defendant as remarked earlier, the said statutory notices were in fact dispatched to Kuching and returned to the advocates of the plaintiff in Kuching on 16 June 2022.

[47] In the circumstances, there was only one attempt made by the post personnel to deliver the said statutory notices to the defendants at their given address which was not successful as the defendants were not at the address of the premises.

[48] There is no evidential material presented to show any further attempt on service of the said statutory notices to the defendants or the same were brought to the attention of the defendants at all.

[49] In the circumstances, it cannot be said that the defendants had refused to accept delivery of the said statutory notices or tried to evade service of the said statutory notices.

[50] The plaintiff relied on s. 6.02(b) of the annexure to memorandum of charge in contending that nevertheless, there were valid services of the said statutory notices on the defendants.

[51] In respect of service of the said statutory notices on the defendants by post, s. 6.02(b) of the annexure to memorandum of charge provides that any demand for payment of the monies thereby secured may be made by notice in writing by the firm of solicitors acting for the plaintiff and such notice shall be deemed to have been sufficiently served on the defendant if it is sent by registered letter or ordinary mail at the address of the defendants and shall be deemed to have been served within three business days after posting when posted within Malaysia.

[52] Were the said statutory notices nevertheless deemed served on or given to the defendants for the purpose of s. 148(1) of the Land Code (Cap 81) by the operation of s. 6.02(b) of the annexure to memorandum of charge notwithstanding the evidence that they were in fact never delivered to the defendants and returned to the plaintiff's advocates? In other words, does it render the fact of service conclusive and irrebuttable by any proof of non-actual service thereof?

[53] Section 208 of the Land Code (Cap 81) provides:

> Methods of effecting service
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> 208. (1) *Any notice required or authorized by this Part* to be served upon any person *shall be delivered to that person* and may be delivered to him either personally or to his wife or husband, as the case may be, or to any adult member of his family residing with him. *If his address in Sarawak is known and there be postal communication with such place, any such notice may be served by posting it by registered letter addressed to that person at the known address.*
>
> (2) In the case of natives, if service by personal delivery is impracticable, the notice may be served by posting it by registered letter addressed to, or by personal service upon, the Penghulu, Tua Kampung or Headman of the community or section of any community to which the native concerned was last known to belong.
>
> (3) If the person is absent from Sarawak, the notice may be delivered as aforesaid to his agent in Sarawak. If he is deceased the notice may be delivered as aforesaid to his personal representative.
>
> (4) If the person is not known, or is absent from Sarawak and has no known agent in Sarawak, or is deceased and has no personal representative, the notice shall be delivered in such manner as may be directed by an order of a court of competent jurisdiction.

A *(5) If service in accordance with subsection (1), (2), (3) or (4) is impracticable, notice may be given by a notification in the Gazette, followed by another insertion of the notice in the next ensuing publication thereof, and any such notices may be consolidated in one or more notifications in such form as may be deemed fit.*

(6) Notwithstanding anything in this section, a court of competent jurisdiction may
B *in any case make an order directing the manner in which any notice is to be delivered or dispensing with the delivery thereof.*

(emphasis added)

[54] Section 3(5) of the Interpretation Ordinance 2005 (Cap. 61) provides that

C Meaning of service by post

(5) Where **any written law authorizes or requires any document to be served by post**, whether the expression "serve", **"give"**, "send" or any other expression is used the service **shall be deemed to be effected** by properly addressing, preparing and posting a letter containing the
D document and, **unless the contrary is proved**, to have been **effected at the time at which the letter would be delivered in the ordinary of post**"

(emphasis added)

[55] In the instant case, the plaintiff has opted to give the said statutory notices to the defendants under s. 148(1) of the Land Code (Cap 81) by
E posting them by registered letters as prescribed under s. 208 of the Land Code (Cap 81).

[56] Reading s. 208 of the Land Code (Cap 81) with s. 3(5) of the Interpretation Ordinance, 2005 (Cap. 61), mere sending by registered post of the said statutory notices to the defendants at their given address pursuant
F to s. 6.02(b) of the annexure to memorandum of charge cannot be construed as conclusive proof of service or of the giving of the said statutory notices to the defendant for the purpose of s. 148(2) of the Land Code (Cap 81).

G **[57]** The proof of the sending by registered post of the said statutory notices to the defendants at their given address merely shifts to the defendants, the burden to prove the contrary.

[58] It only gives rise to a presumption of the services or of the giving of the said statutory notices to the defendants which presumption is rebuttable
H by contrary evidence adduced by the defendants.

See: *Goh Teng Whoo & Anor v. Ample Objectives Sdn Bhd* [2021] 4 CLJ 348 (FC).

[59] It cannot be controverted that the purpose of requiring a chargee to give the statutory notice under s. 148(1) of the Land Code (Cap 81) was
I intended to give protection to a chargor against having their charged land sold

by reason of some default on the part of chargor until the chargor had notice of the default and to give the chargor the opportunity to remedy that default or to give the chargor a chance to redeem the charged land.

See: *Mediservices International Pty Ltd v. Stocks and Realty (Security Finance) Pty Ltd* [1982] 1 NSWLR 516; *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors* [1997] 3 CLJ 274; [1997] 2 MLJ 805; and *United Peoples' Organisation (World Wide) Inc v. Rakino Farms Limited (No. 2)* [1964] NZLR 739 at 741.

[60] To construe the word "deemed" used in s. 6.02(b) of the annexure to memorandum of charge as to render proof of sending the said statutory notices by registered post to the defendants at their given address as irrebuttable presumption and conclusive proof of service of the said statutory notices upon the defendants would be defeating the purpose of the requirement to give such statutory notice and also repugnant to the s. 148(1) and s. 208 of the Land Code (Cap 81) read with s. 3(5) of the Interpretation Ordinance 2005 (Cap. 61).

[61] In the premises, the defendants have successfully rebutted the presumption that they were not indeed served or given the said statutory notices issued by the plaintiff's solicitors by the production of the print-outs of the trace and tracking of the delivery of the said statutory notices from the website of Pos Malaysia which shows that the said statutory notices were all returned to the plaintiff and undelivered to the defendants.

[62] As the said statutory notices have not been given to the defendants as the chargors as required under s. 148(1) of the Land Code (Cap 81), the plaintiff as the chargee is not entitled to make the application in the instant action and not entitled to the order of sale as sought for under s. 148(2)(c) of the Land Code (Cap 81).

Whether The Plaintiff Is Entitled To Seek An Order For Sale Of Portion Of The Charged Land

[63] If this court is also wrong in holding that the said statutory notices were not given or lawfully given to the defendants as the chargors as required under s. 148(1) of the Land Code (Cap 81), the court will proceed further to consider whether the plaintiff as the chargee is entitled to seek for an order for the sale of only a portion of the charged land constituting the hypermarket when no document of titles thereto have been issued yet.

[64] Learned counsel for the defendants submitted that the order for sale of the hypermarket, being a portion of the charged land namely the Parent Lot 1304 is *ultra vires* the provisions of the Land Code (Cap 81) as there is no charge over the hypermarket, there is no separate issue documents of title in respect of the hypermarket, there is uncertainty as to the lot number of the hypermarket and the hypermarket cannot be transferred by the provision of the Land Code (Cap 81).

[65] Learned counsel for the defendants also submitted that it is unjust for the plaintiff to seek an order for sale or unconscionable to enforce the security created by the said memorandum of charge as the defendants are beneficial owners of 28% of the hypermarket whereas the borrower who has since been wound up on 19 January 2022 owns the remaining 72%.

[66] Learned counsel for the plaintiff submitted basically that the plaintiff was entitled to seek an order for sale of the hypermarket, that there was no uncertainty as to the lot number of the hypermarket based on the approved plans for development in the subdivision approval, that the order for sale sought by the plaintiff for sale of the hypermarket is not *ultra vires* the provisions of the Land Code (Cap 81) and that it is just in the circumstances for an order for sale of the hypermarket to be granted.

[67] In *Murugappa Chettiar v. Letchumanan Chettia*r [1938] 1 LNS 43; [1939] 1 MLJ 296, in determining whether it was "unjust" to grant an order for sale of the charged land under the s. 149 of the Land Code (Cap 138) then applicable in the Federated Malay States, Aitken J held that by "unjust" it meant contrary to those rules of common law and equity in force.

[68] The corollary is that it is just to grant an order for sale of the charged land when the circumstances are not such that it would be contrary to any rules of common law and equity in force.

[69] Therefore to determine whether it is just in the circumstances to make an order for sale would also entail the consideration whether it would be contrary to the rules of commons law and equity in force.

See: *Kuching Plaza Sdn Bhd v. Bank Bumiputra (M) Bhd* [1991] 3 CLJ 1702; [1991] 1 CLJ (Rep) 223; [1991] 3 MLJ 163; and *RHB Bank Bhd v. Alom Industries Sdn Bhd* [2007] 5 CLJ 138; [2007] 4 MLJ 438.

[70] It is indisputable that by the said memorandum of charge executed by the defendants and registered, the whole parcel of the land constituting the Parent Lot 1304 comprised in one document of title has been charged to the plaintiff.

[71] Though, when the Parent Lot 1304 was charged to the plaintiff, the proposed plan concerned for its subdivision for commercial and residential development was approved by the State Planning Authority under s. 232 of the Land Code (Cap 81), the subdivision and issuance of the subdivided titles for the proposed subdivided lots in the subdivision approval is subject to conditions imposed, generally the completion of the development as approved thereon and compliance with the conditions thereto as may be imposed by the relevant authorities for the development under any provisions in Part X of the Land Code (Cap 81)

[72] Until completion of the development on the Parent Lot 1304 in the subdivision approval in accordance with the conditions imposed by the relevant authorities under the provisions in Part X of the Land Code (Cap 81) and issuance of the separate individual documents of title for the proposed subdivided lots in subdivision approval under s. 244 of the Land Code (Cap 81), there can be no subdivision of the Parent Lot 1304.

[73] In other words, it cannot be said that the Parent Lot 1304 has been subdivided until the issuance of the new documents of title for the proposed subdivided lots in the subdivision approval.

[74] The land comprised in document of title for the Parent Lot 1304 in the subdivision approval was only in the process of development and subdivision as approved by the State Planning Authority and not subdivided yet.

[75] Is the plaintiff as the chargee entitled to be granted or is it permissible for the court to make under s. 148(2)(c) of the Land Code (Cap 81), an order for sale of the hypermarket being only a portion of the charged land when the charged land has not yet been subdivided and when new documents of title thereto have not been issued?

[76] A charge under the Land Code (Cap 81) is a creature of statute. The plaintiff as the chargee is accorded only so much right of remedies as may be conferred by statute as against the charged land in the event of default by the defendants as chargors. So is the power of the court in ordering the sale of the charged land.

See: *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors* [1997] 3 CLJ 274; [1997] 2 MLJ 805; and *Taylor v. Parkinson & Blyth* (1911) 31 NZLR 354.

[77] Section 148(2) of the Land Code (Cap 81) provides that if the chargor fails to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court for the sale of the "charged land" and not any part or portion thereof.

[78] Section 2 of the Land Code (Cap 81) defines "land" as including:

(i) that surface of the earth and all substances forming that surface;

(ii) the earth below the surface and all rock materials, minerals and substances under the surface;

(iii) all vegetations and other natural products whether on or below the surface;

(iv) all things attached to the earth or permanently fastened to anything attached to the earth;

(v) land covered with water within the boundary of the State of Sarawak; and

(vi) that column of the airspace above the surface of the earth on the land.

[79] The phrase 'charged land' referred to in s. 148(2) of the Land Code (Cap 81) without qualifications must necessarily means all the area of the land including all those things as are included by the definition of "land" under s. 2 of the Land Code and comprised in the document of title issued for the Parent Lot 1304 and not only a part or portion of the land concerned.

[80] *In Arab-Malaysian Merchant Bank Bhd v. Low Toon Thye* [1997] 1 LNS 292; [1997] MLJU 132, the court held that an order could not be made for a part of the land to be sold as applied for by the chargee when the whole land and not a part only was charged.

[81] In *Stewart v. Rowsom* [1892] OJ No. 162, the statutory power of sale by the mortgagee was phrased as "to sell ... the lands, tenements, hereditaments, and premises hereby conveyed ... or any part or parts thereof, with the appurtenances". The Ontario High Court of Justice held nevertheless that that did not authorise the mortgagee to sell the timber on the land without the land.

See also: *Buckley v. Howell*, 29 Beav 546 at 553; and *Re Yates Batcheldor v. Yates* (1888) 38 Ch D 112.

[82] Further, upon the successful sale of the charged land as ordered by the court, for the purpose of s. 150(4) of the Land Code (Cap 81), s. 150(3) therein provides that after the payment of the purchase price and such other moneys as may be necessary by the successful purchaser, not only a memorandum of transfer is to be executed in favour of the transferee by such person, including an officer of the court as the court may order, but also requires the executed memorandum of transfer to be presented with the necessary document of title in respect of the land sold to be presented for registration.

[83] Section 150(3) and s. 150(4) of the Land Code (Cap 81) are reproduced as follows:

> (3) Where a sale has been effected either to the chargee or to any other person, a memorandum of transfer shall, after payment of the purchase price and such other moneys as may be necessary, be executed in favour of the transferee by such person, including an officer of the court, as the court may order and shall, **with the necessary document of title, be presented to the Registrar for registration**.
>
> (4) Upon the registration of any memorandum of transfer executed in accordance with this section, the estate or interest of the chargor therein expressed to be transferred shall vest in the transferee, freed and discharged from the liability under the charge under which the power of

sale has been exercised and from any other estate or interest, except an estate or interest which has priority over the charge or which by reason of the consent of the chargee is binding on him, and the Registrar may make in the Register any entry necessary to show that every such liability, estate or interest has been so determined. (emphasis added)

[84] The provisions envisage the "charged land" ordered to be sold under s. 148(1)(c) of the Land Code (Cap 81) must have a document of title and the charged land sold to a successful purchaser pursuant to the order sale made must be capable of transfer under the provisions of the Land Code (Cap 81) by registration of the executed memorandum of transfer.

[85] It is not possible for compliance of the requirements of s. 150(3) of the Land Code (Cap 81) if the sale is only a portion of the charged land comprised in the existing document of title in the process of being subdivided.

[86] In the instant case, there can be no document of the title for the portion of the Parent Lot 1304 constituting the hypermarket until the completion of the development on the land concerned in accordance with the terms and conditions imposed and until the grant or issuance of separate individual documents of title for the proposed subdivided lots in subdivision approval *in lieu* of the existing document of title for the Parent Lot 1304 under s. 244, Part X of the Land Code (Cap 81)

[87] Section 25 of the Land Code (Cap 81) also provides that:

25. Sub-division

No **proprietor** of land may **sub-divide his land and transfer or sublease** any sub-division thereof except in accordance with Part X and any rules made thereunder and subject to such terms and conditions as may be imposed by the State Planning Authority for such sub-division. (emphasis added)

[88] Though s. 232, Part X of the Land Code (Cap 81) provides for approval by the State Planning Authority of any proposed subdivision or development on any land and the sections thereafter also provides for procedure to be followed upon approval of the plan leading to the surrender of the existing document of title to the land developed and for the grant of the new documents of title *in lieu* thereof for the subdivided lots proposed and approved under s. 244, there is no provision to permit the proposed subdivided lots to be transferred before the grant or issuance of new documents of title thereto.

[89] The court is mindful of the s. 137(3) of the Land Code (Cap 81) which provides that:

(3) Upon any lawful transfer of part of the land comprised in any existing document of title, a new document of title shall be issued for the part transferred and another document of title shall be issued for the balance, **pursuant to section 25**. (emphasis added)

[90] However, the provisions under s. 25 of the Land Code (Cap. 81) again requires transfer of a part or portion of the land comprised in any existing document of title to be in accordance and compliance with the provisions of subdivision in Part X of the Land Code (Cap 81).

[91] Section 129(1) of the Land Code (Cap 81) also provides for partition of land comprised in a document of title held by co-proprietors in undivided share. However, it also provided that 'no partition shall be effected except in accordance with Part X and subject to such terms and conditions as may be imposed by the State Planning Authority'.

[92] Section 235 of the Land Code (Cap 81) also required an endorsement to be made in the register in respect of any land affected by any approved plan for subdivision that such land is subject to the conditions of such approved plan.

[93] Having considered all these provisions, the court is only empowered under s. 148(1)(c) of the Land Code (Cap 81) to make an order for sale of the whole parcel of the "charged land" with a document of title thereto.

[94] Therefore, a chargee is entitled to the remedy of an order of sale of a wholly-charged land and not a portion therein or of some proposed subdivided lots therefrom as may be approved in a development plan for which there are no separate individual documents of title thereto granted or issued.

[95] In the circumstances, to grant the order for sale of the hypermarket as sought for by the plaintiff without and before the grant or issuance of the separate individual documents of title thereto would have the effect of partitioning or subdividing the charged land notwithstanding that the terms and conditions in the subdivision approval have not been fully complied with or contrary to or in avoidance of the provisions for subdivision. It would be repugnant to ss. 25, 150(3) and the provisions for subdivision in Part X of the Land Code (Cap 81).

[96] That being the case, the court therefore holds that the plaintiff is not entitled and it is also beyond the limit of the power of the court to grant the order for the sale of only the hypermarket as sought for by the plaintiff by the amended originating summons in this action. It cannot be granted.

Pronouncement And Orders

[97] In the premises and for the reasons as given, this court holds that:

(i) the said statutory notices (exh. TMH-9 of encl. 2) were not lawfully given on behalf of the plaintiff by its solicitor to the defendants under s. 148(2) of the Land Code (Cap 81);

(ii) as the said statutory notices were not lawfully given to the defendants, the plaintiff as the chargee is not entitled to make the application in the instant action for the order for sale under s. 148(2)(c) of the Land Code (Cap 81); and

(c) the plaintiff as the chargee is not entitled to the remedy of an order of sale of the hypermarket, being only a portion of the charged land (*ie*, the Parent Lot 1304) and it is also beyond the power of the court to grant such order as sought for by the plaintiff in the amended originating summons.

[98] Therefore, this court dismisses the plaintiff's amended originating summons herein.

[99] The defendants are entitled to costs of the action which this court allows a sum of RM15,000 subject to and with allocator fee to be paid by the plaintiff to the defendants jointly.